84187-0

No. 271234, consolidated with
271242, 271251, 271269, 271277

Kittitas County Cause Nos. 08-2-00195-7; 08-2-00210-4; 08-2-00224-4;
08-2-00231-7; 08-2-00239-2
Consolidated Under No. 08-2-00195-7

THE COURT OF APPEALS, DIVISION III
IN THE STATE OF WASHINGTON

KITTITAS COUNTY, a political subdivision of the State of Washington, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW), CENTRAL WASHINGTON HOME BUILDERS (CWHBA), MITCHELL WILLIAMS d/b/a MF WILLIAMS CONSTRUCTION CO., TEANAWAY RIDGE, LLC., KITTITAS COUNTY FARM BUREAU, and SON VIDA II,

Petitioners,

v.

KITTITAS COUNTY CONSERVATION, RIDGE, FUTUREWISE, and EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Respondent.

OPENING BRIEF OF BIAW (AMENDED)

Julie M. Nichols, WSBA No. 37685
Building Industry Association
of Washington
111 21St Avenue SW
Olympia, WA 98507
Telephone: (360) 352-7800
Facsimile: (360) 352-7801

ORIGINAL

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. Introduction

Appellants Central Washington Home Builders Association of Washington, the Building Industry Association of Washington and Mitchell F. Williams d/b/a MF Williams Construction Co. Inc. (collectively, "BIAW"), Intervenors/Petitioners before the Growth Management Hearings Board for Eastern Washington (hereinafter "Board") submits this Opening Brief in its appeal of the Final Decision and Order (FDO) issued by the Hearings Board on March 21, 2008.

II. Assignments of Error

BIAW assigns the following errors in the Findings of Facts and/or Conclusions of Law in the FDO (AR, p. 1250-1254):

a. Finding of Fact 3, regarding "urban-like densities" in rural areas and the County's "written record" is a conclusion of law, and, regardless of its characterization, is not supported by the record before the Board and is a misstatement and/or misrepresentation of the applicable law.
b. Finding of Fact 5, pertaining to urban uses and agricultural lands of long term significance, is a conclusion of law, and, regardless of its characterization, is not supported by the record.
c. Finding of Fact 6, regarding protection of water, is a conclusion of law and outside the jurisdiction of the Board and a misstatement and/or misrepresentation of the applicable law a misstatement and/or misrepresentation of the applicable law.
d. Finding of Fact 7, regarding rural areas, is a conclusion of law and regardless of its characterization, is not supported by the record and is a misstatement and/or misrepresentation of the applicable law.
e. Finding of Fact 8, pertaining to agricultural lands of long term significance is a conclusion of law and regardless of its characterization, is not supported by the record and is a misstatement and/or misrepresentation of the applicable law.
f. Conclusion of Law 5, pertaining to densities in rural areas and the County's "written record," is a misstatement and/or misrepresentation of the applicable law.
g. Conclusion of Law 6, pertaining to rural densities, is a misstatement and/or misrepresentation of the applicable law.

h. Conclusion of Law 7, pertaining to agricultural lands of long-term significance, is a misstatement and/or misrepresentation of the applicable law.
i. Conclusion of Law 8, regarding protection of water, is outside the jurisdiction of the Board, and is a misstatement and/or misrepresentation of the applicable law.
j. Invalidity Finding of Fact 1, regarding rural and agricultural zoning, is a conclusion of law and regardless of its characterization, is not supported by the record and is a misstatement and/or misrepresentation of the applicable law.
k. Invalidity Finding of Fact 2, regarding Cluster Platting and zoning, is a conclusion of law and regardless of its characterization, is not supported by the record and is a misstatement and/or misrepresentation of the applicable law.
l. Invalidity Finding of Fact 3, regarding rural densities, is a conclusion of law and regardless of its characterization, is a misstatement and/or misrepresentation of the applicable law.
m. Invalidity Finding of Fact 4, regarding low-density development, is a conclusion of law and regardless of its characterization, is a misstatement and/or misrepresentation of the applicable law.
n. Invalidity Finding of Fact 6, pertaining to protection of water, is outside the jurisdiction of the Board, and is a misstatement and/or misrepresentation of the applicable law.
o. Conclusions of Law 2 and 3, concluding that Kittitas County allowed "improper densities" and these actions interfere with the County's "ability to engage in GMA-compliant planning," are misstatements and/or misrepresentations of the applicable law.
p. The Hearings Board erroneously interpreted and applied the law and acted outside its authority in determining that 1) densities greater than one dwelling unit per five acres are not rural in nature and 2) Kittitas County failed to protect water quality and quantity.

III. Statement of the Case

A. GMA policy requirements

The GMA requires "the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan" RCW 36.70A.040(3).

The thirteen planning goals in the GMA goals "shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations." RCW 36.70A.020.

"Development regulations" are defined as: "the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city." RCW 36.70A.020.

The GMA requires that local governments include a rural element within its comprehensive plan that designates rural lands. RCW 36.70A.070(5). Rural lands are those lands "not designated for urban growth, agriculture, forest, or mineral resources." RCW 36.70A.070(5). Recognizing that circumstances differ from county to county, the GMA explicitly allows local jurisdictions to consider local circumstances when establishing its pattern of rural densities. *See* RCW 36.70A.070(5)(a). In doing so, the county must provide a written record explaining how the rural element harmonizes the GMA planning goals and the requirements of the Act. *Id.*

In addition to permitting clustering in agricultural lands, the GMA requires counties planning for "rural development" to "provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses." RCW 36.70A.070(5). Local governments can achieve a

variety of rural densities through "clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate densities and uses that are not characterized by urban growth and that are consistent with rural character." *Id.*

On July 19, 2007, Kittitas County enacted Ordinance 2007-22, which updated the County's Development Code.

The County's Performance-Based Cluster Platting regulations are found in KCC 17.14.

The County's Planned Unit Development Zone regulations appear in KCC 17.36.

The County's Commercial Agricultural Zone regulations are found in KCC 17.31.

KCC 16.09 (Subdivision Code-Performance Based Cluster Platting), KCC 17.08 (Definitions), 17.12 (Zones Designated), KCC 17.22 (Urban Residential Zone), KCC 17.28 (Agricultural Zone), KCC 17.30 (Rural Zone), and KCC 17.56 (Forest and Range Zone) are all at issue in this case because the Growth Board Ruled that all of these are out of compliance for allowing urban-like densities.

B. Procedural History & Facts

On July 19, 2007, Kittitas County enacted Ordinance 2007-22, which updated the County's Development Code. On September 24, 2007, Futurewise, Kittitas County Conservation, and Ridge (collectively, "Futurewise") filed a petition for review, pursuant to RCW 36.70A.290, with the Eastern Washington Growth Management Hearings Board. On October 15, 2007, the Building Industry Association of Washington, Central Washington Home Builders Association, and Mitchell Williams (collectively "BIAW") filed a motion to intervene. The Growth Board granted BIAW's motion.

On March 21, 2008, the Growth Board issued its Final Decision Order (FDO), Case No. 07-1-0015. *See* AR, p. 1193-1261. The Board found Ordinance 2007-22 noncompliant with the GMA and ruled certain portions of Kittitas County's Code invalid.[1] Specifically, the Growth Board ruled that Kittitas County's development regulations violated the GMA by allowing rural densities greater than one dwelling unit per five acres. (Issue 1 of the Growth Board's Final Decision and Order). *See* AR, p. 1204 & 1253 (ruling that densities of one home per three acres are urban in nature and thus noncompliance with the GMA). The Growth Board also found Ordinance 2007-22 noncompliant and invalid for failing to prohibit urban uses and urban development in rural areas in chapters KCC 17.29 and 17.36. (Issue 2 of the FDO). *See* AR, p. 1212-1213.

Further, the Growth Board found that Ordinance 2007-22 violated the GMA by failing to require that all land within a common ownership or scheme of development be included within one application for a division of land. (Issue 4). *See* AR, p. 1221-1223. Specifically, the Growth Board ruled that this ordinance impermissibly allowed too many exempt wells under RCW 90.44.050 and thus violated the GMA.

Similar issues are on appeal in a related case regarding the County's Comprehensive Plan. On August 20, 2007, the Growth Management Hearings Board ("Board") issued its Final Decision and Order (FDO), Case No. 08-1-0004c, where the Board ruled that a number of provisions in Kittitas County's Comprehensive Plan violated the Growth Management Act, RCW 36.70A *et seq*. Specifically, the Board ruled

---

[1] The Growth Board entered a determination of invalidity for chapters KCC 16.09, KCC 17.08, KCC 17.22, KCC 17.28, KCC 17.30, KCC 17.56 of Ordinance 2007-22.

that Kittitas County's Comprehensive Plan violated the GMA for allowing rural densities of one home per three acres, by failing to provide a variety of rural densities, and by failing to revise the Cluster Platting Ordinance and Planned Unit Development Ordinance.

IV. Argument

A. Standard of Review: The GMA Grants Great Discretion to Counties When Planning for Growth

The GMA grants counties broad discretion when planning under the GMA and sets a presumption of validity for development regulations. RCW 36.70A.320. Specifically, RCW 36.70A.320, the provision providing the proper standard of review, provides in pertinent part:

> (1) ...comprehensive plans and development regulations, and the amendments thereto, adopted under this chapter are *presumed valid* upon adoption.
>
> (2)...the *burden is on the petitioner* to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter."
>
> (3)... The *board shall find compliance* unless it determines that the action by the state agency, county, or city is *clearly erroneous* in view of the entire record before the board and in light of the goals and requirements of this chapter.

(Emphasis added.)

When appealing a Board decision, the Administrative Procedure Act controls, and the appealing party has the burden of proving invalidity of the board's actions. RCW 34.05.570(3). Further, "[a] Board's order must be supported by substantial evidence to persuade a fair-minded person the truth or correctness of the order." *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38, 44 (2008) (secondary citations omitted). Issues of law are reviewed de novo and on mixed

questions of law and fact, the court determines the law independently and then applies it to the facts as found by the Board. See *Thurston County*, 164 Wn.2d 329, 190 P.3d 38, see also *Lewis County v. W, Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 139 P.3d 1096 (2006).

In addition to the clear language in the GMA itself, the Legislature later amended the GMA to include an intent section further enunciating its desire to provide greater deference to local governments. *See* Laws of 1997, ch. 429, §§ 2, 20 (codified as RCW 36.70A.320(3) and .3201); *see also Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 237, 110 P.3d 1132 (2005). The Legislature amended the statute in response to the GMA being "riddled with politically necessary omissions, internal consistencies, and vague language." *Id.* at 232. The court in *Quadrant* noted that as a result of the ambiguity about the proper deference to be afforded to local governments when planning under the GMA, the Legislature "took the unusual additional step of enacting into law its statement of intent in amending RCW 36.70A.320 to accord counties and cities planning under the GMA additional deference." *Id.* At 237.

The Legislature left no doubt what its intentions were when it came to the proper deference to be afforded to local governments planning under the GMA. The relevant provision provides:

> In amending RCW 36.70A.320(3) by section 20(3), chapter 429, Laws of 1997, the legislature intends that the boards apply a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and

> development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.3201(emphasis added).

In light of this unambiguous language, the State Supreme Court explicitly noted: "In the face of this clear legislative directive, we now hold that deference to county planning actions, that are consistent with the goals and requirements of the GMA, *supersedes* deference granted by the APA and courts to administrative bodies." *Quadrant*, 154 Wn.2d at 238 (emphasis added). Other GMA cases also make clear that the Act grants local officials broad discretion and ultimate responsibility and authority for determining how to apply its requirements to the particular circumstances of their communities. RCW 36.70A.320 & 36.70A.3201; *Quadrant,* 154 Wn.2d at 233, 110 P.3d 1132; *Manke Lumber Co., Inc. v. Central Puget Sound Growth Mgmt Hearings Bd.*, 113 Wn.App. 615, 626-27, 53 P.3d 1011 (2002). "Great deference is accorded to a local government's decisions that are 'consistent with the requirements and goals' of the GMA" *Thurston County*, 164 Wash.2d at 337, 190 P.3d 38. "The GMA recognizes regional differences and allows counties to consider local circumstances when designating rural densities so long as the local government creates a written record explaining how the rural element harmonizes the GMA requirements and goals." *Id.*

This strong and unequivocally clear mandate providing local jurisdictions more deference planning under the GMA was further discussed in *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005). There, the State Supreme Court said that

the "GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs." *Id.* at 125-26.

Kittitas County's development regulations, as amended by Ordinance 2007-22, are presumed valid upon adoption. Before the Board can find an action clearly erroneous, the Board must be left with the firm and definite conviction that a mistake has been committed. *Dep't of Ecology v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 552, 14 P.3d 133 (2000).

Further, the GMA also expressly grants local governments discretion in establishing the pattern of rural densities. *See* RCW 36.70A.070(5)(a) ("[B]ecause circumstances vary from county to county, in establishing patterns of rural densities ... a county may consider local circumstances."). Counties must include a written record explaining how the rural element harmonizes the GMA's goals and meets the statutory requirements. The Court in *Thurston County* re-iterated that "[t]he legislature did not specifically define what constitutes a rural density. Instead it provided local governments with general guidelines for designating rural densities. A rural density is 'not characterized by urban growth' and is 'consistent with rural character.'" *Thurston County*, 164 Wn. 2d at 359, 190 P.3d 38.

The importance of the proper burden of proof cannot be overstated. The GMA requires that local jurisdiction planning actions are presumed valid unless found to be clearly erroneous. Here, the Board ignored the clear legislative directive and case law that directs it to provide Kittitas County discretion when planning for its growth. Instead, the Board imposed a one-size-fits-all, bright line rule of five-acre minimum lots in the

rural portions of the County. Moreover, the Board improperly shifted the burden to the County.

B. The Growth Management Hearings Board Erred by Ruling that the Growth Management Act Does Not Allow Rural Densities of One Dwelling Unit Per Three Acres

The Growth Board struck down Kittitas County's development regulations in part because the County allows rural densities of one dwelling unit per three acres in a small fraction of the County. *See* AR, p. 1206-1207.[2] According to the Growth Board, densities allowing one dwelling unit per three acres in areas zoned Rural-3 and Agriculture-3 are "urban" in nature and thus a violation of the GMA. *Id.* The Board later concludes that "[t]he County adopted regulations which allow densities greater than 1 du/5 acres in the rural area, interfering with RCW 36.70A.020(1)." AR, p. 1253. In so ruling, the Growth Board ignores the plain language of the GMA and well-established case law that says Growth Boards may not impose bright line rules regarding densities. *See* RCW 36.70A.020 (4, 5, 6, 8, & 9), RCW 36.70A.320; RCW 36.70A.3201; RCW 36.70.115, RCW 36.70.070(5)(a)-(b), RCW 36.70A.090; *see also Thurston,* 164 Wn.2d 329, 190 P.3d 38; *Viking Properties*, 155 Wn.2d at 129, 118 P.3d 322; *Quadrant Corp.*, 154 Wn.2d at 233-34, 110 P.3d 1132.

1. The GMA Contains No Language Requiring A Minimum of Five Acre Lots in Rural Areas

The Board reads into the GMA a requirement that rural densities can be no greater than one dwelling unit per five acres. Yet, no such language exists in the GMA.

---

[2] Specifically, the Growth Board found KCC 17.28, 17.30, 16.09, 17.08, 17.12,17.22, and 17.56 out of compliance with the GMA.

"The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, L.L.C*, 146 Wn.2d 1, 9, 10, 43 P.3d 4 (2002); *see also State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). In addition, a court or board "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *State v. Delgado*, 148 Wn.2d 723, 727 63 P.3d 792 (2003). Instead, the court is to "assume the legislature 'means exactly what it says.'" *Delgado*, 148 Wn.2d at 727, citing *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999).

The Legislature, with great detail, explained how local jurisdictions are to designate rural densities in rural areas. The GMA requires local jurisdictions to include a rural element within its comprehensive plan and set a variety of rural densities. The GMA provides, in pertinent part:

> (5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The following provisions shall apply to the rural element:
>
> (a) Growth management act goals and local circumstances. Because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter.
>
> (b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.

> (c) Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by:
>
> (i) Containing or otherwise controlling rural development;
>
> (ii) Assuring visual compatibility of rural development with the surrounding rural area;
>
> (iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;
>
> (iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and ground water resources; and
>
> (v) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.

RCW 36.70A.070(5)(a)-(c) (emphasis added).

Notably absent is any reference to a bright line rule requiring a minimum density of one dwelling unit per five acres within rural areas. Instead, the statute specifically allows local governments to set a variety of densities based on local circumstances. To achieve a variety of rural densities, the GMA also allows local jurisdictions to apply innovative techniques, such as clustering, which Kittitas County's Rural-3 zone provides for. *See* KCC 16.09

2. Washington Courts have made clear that the GMA imposes no bright-line rule for rural density.

The Growth Board's decision is also in direct conflict with case law on this issue, including a unanimous 2008 Washington Supreme Court decision in *Thurston County*, 164 Wn.2d 329, 190 P.3d 38.

The *Thurston County* case involved the question of whether Boards may impose bright-line rules defining rural densities. The Supreme Court held they may not. *Id.* Thurston County's comprehensive plan stated that there may be areas of higher densities – as high as two dwelling units per acre in certain areas. Similarly to this case, the Growth Board in *Thurston County* concluded (and the Court of Appeals confirmed) that

densities greater than one dwelling unit per five acres are not rural densities. Similarly, in this case, the Board found that the County violated the GMA by allowing "densities greater than 1 du/5 acres in the rural area." *See* AR, p. 1253[3]. According to the Growth Board in the instant case, densities allowing one home per three acres in areas zoned Rural-3 and Agriculture-3 are "urban" in nature and thus a violation of the GMA. AR, p. 1206.

The *Thurston County* case is just the most recent of a line of cases making clear that the Growth Boards do not have authority to create bright line rules, and in particular, bright line rules concerning densities. *See Viking Properties*, 155 Wn.2d 112, 118 P.3d 322. In *Viking Properties*, a developer wanted to build four units per acre, but a covenant running with the land limited development to two units per one acre. *Id.* at 117. The developer cited existing Growth Board decisions that created a "bright line" rule of a minimum four units per acre in urban areas to bolster his claim. *Id.* at 129. The Supreme Court dismissed this argument explaining that "the growth management hearings boards do not have authority to make 'public policy' even within the limited scope of their jurisdictions, let alone to make statewide public policy." *Id.*

The Court in *Thurston County* once again cleared up any ambiguity that might have remained on the issue of bright-line rules. First noting that counties have "a great amount of discretion to employ various techniques to achieve a variety of rural densities," the Court went on to strike down the bright line rule that the Growth Board and Court of Appeals applied:

---

[3] See also Finding of Fact 3, AR, p.1253 ("The County adopted regulations which allow densities greater than 1 du/5 acres in the rural area interfering with RCW 36.70A.020(1).")

> The GMHB, as a quasi-judicial agency, lacks the power to make bright line rules regarding maximum rural densities. We hold a GMHB may not use a bright line rule to delineate between urban and rural densities, nor may it subject certain densities to increased scrutiny." (emphasis added) *Thurston County*, 164 Wn.2d at 358-59, 190 P.3d 38. (Quoting *Viking Props.*, 155 Wn.2d at 129-30, 118 P.3d 322).

Then, the Court in *Thurston County* directly addressed specific Board decisions that have utilized bright line standards to distinguish between urban and rural. In a footnote, the Court said "[W]e have rejected any bright-line rule delineating between urban and rural densities." *Thurston County*, 164 Wn.2d at 359, 190 P.3d 38 (footnote 22).

The Court in *Thurston County* also made clear that the way the question was framed resulted in a bright-line rule, even though the Board may not have explicitly adopted such a rule. Footnote 20 states:

> "Although the Board did not explicitly adopt a five acre bright-line rule, such a rule was implicit in its decision because of the way the issue regarding rural densities was framed. The Board framed the issue as to whether the County's comprehensive plan failed to comply with the GMA by allowing 'development at densities of greater than one unit per five acres when this board has determined that such densities fail to comply with the GMA.' *Thurston County*, 164 Wn.2d at 358, 190 P.3d 38.

In the *Thurston County* case, the Board considered the question: "D. Whether a comprehensive plan provides for a variety of rural densities in accordance with former RCW 36.70A.070(5)(b) when resource lands and densities greater than one dwelling unit per five acres are included in the rural element." (emphasis added) *Thurston County*, 164 Wn.2d at 355, 190 P.3d at 50.

Similarly, the specific issue before the Growth Board in the related case was: "Does Kittitas County's failure to . . . eliminate densities greater than one dwelling unit per five acres in the rural area...violate [the GMA]?" AR, p. 1197. (emphasis added). The

Growth Board ultimately ruled that Kittitas County's rural densities of one unit dwelling per three acres violated the GMA. *See* AR, p.1204.[4]

The decisions in *Thurston County* and *Viking Properties* made clear that the GMA does not give Boards the authority to make policy or to impose "bright line" rules regarding how local governments are to comply with GMA obligations. *Thurston County*, 164 Wn.2d 329, 190 P.3d 38, *Viking Props.*, 155 Wn.2d 112, 118 P.3d 322. It is well-settled that an administrative agency has only those powers that are expressly or implicitly granted to it by statute. *Burlington Northern, Inc. v. Johnston*, 89 Wn.2d 321, 326, 572 P.2d 1085 (1977). Actions of an agency in excess of its statutory authority are void. *Port Townsend School Distr. No. 50 v. Brouillet*, 20 Wn. App. 646, 653, 587 P.2d 555 (1978); *see also Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539 866 P.2d 189 (1994). The Board, acting outside its authority, based its decision on a "bright line" rule regarding minimum rural densities, when such bright line rule does not exist in the GMA.

By ignoring Kittitas County's local circumstances and evidence in the record, the Growth Board impermissibly imposed its own policy decisions over that of Kittitas County. In addition, the Growth Board failed to properly grant the County discretion when planning under the GMA by adopting a bright line test of one dwelling unit per five acres.

In addition, the Growth Board failed to grant proper deference to local jurisdictions when enacting their comprehensive plans and development regulations. *See*

---

[4] The Board incorporated by reference in its entirety the Board Analysis set forth in Legal Issue No. 1 for the prior case, Kittitas Conservation, et al., EWGMHB Case No. 07-1-0004. See also Finding of Fact #3 ("The County adopted regulations which allow densities greater than 1 du/5 acres in the rural area interfering with RCW 36.70A.020(1)."),

36.70A.3201 ("The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community."); *see also*, *Quadrant*, 154 Wn.2d at 233-34, 110 P.3d 1132 (The GMA grants local jurisdictions broad discretion in adopting GMA requirements to local realities).

In striking down Kittitas County's development regulations, the Growth Board erroneously applied and interpreted the law by ruling that densities of one dwelling unit per three acres in the rural areas is "urban" development and thus a violation of the GMA. The Growth Board also ignored the overwhelming evidence in the record explaining how the development regulations are based on local circumstances.

3. The GMA Does Not Elevate Certain Goals to the Detriment of Other Goals

By imposing a uniform rural density requirement in all rural areas, the Board elevates the GMA planning goals of reducing sprawl and encouraging urban development to the detriment of the other goals Kittitas County is required to weigh when adopting its development regulations. This is not supported by either statute or case law.

The GMA lists 13 non-weighted goals local jurisdictions are to apply when adopting their comprehensive pls and development regulations. RCW 36.70A.020 ("The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations . . ."). In addition to the plain language of the RCW 36.70A.020, this Court recently clarified the statute and affirmed that the goals are to be applied evenly:

> Viking's public policy argument also fails to the extent that it implicitly requires us to elevate the singular goal of urban density to the detriment of other equally important GMA goals. To do so would violate the legislature's express statement that the GMA's general goals are nonprioritized. We are ever cognizant that this is a legislative prerogative and have prioritized the GMA's goals only under the narrowest of circumstances, where certain goals came into direct and irreconcilable conflict as applied to the facts of a specific case. We decline Viking's invitation to create an inflexible hierarchy of the GMA goals where such a hierarchy was explicitly rejected by the legislature.

Viking Properties, 155 Wn.2d at 127-28, 118 P.3d 322 (citations omitted; emphasis added).

The Board failed to give equal consideration to the other equally weighted GMA goals, such as protecting affordable housing,[5] economic development,[6] and property rights[7] which are weighted as equally as the goals of encouraging urban development and reducing sprawl.

Because no singular GMA goal is to be elevated above others, the Board erred in giving more weight to the goal to reduce sprawl at the detriment of the other equally-weighted goals of the GMA.

---

[5] Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock. RCW 36.70A.020(4).

[6] Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities. RCW 36.70A.020(5).

[7] Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions. RCW 36.70A.020(6).

In its ruling, the Board effectively turns the GMA on its head by replacing the GMA's bottom-up planning approach with top-down command and control whereby bright line rules are imposed by the Growth Boards in a uniform manner on all local jurisdictions. Unlike Oregon's growth planning law and Washington's Shoreline Management Act, the GMA does not require state administrative approval of local regulations. *See* Richard L. Settle, *Washington's Growth Management Revolution Goes to Court*, 23 Seattle U. L. Rev. 5, 11 (1999); *see also Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 856, 123 P.3d 102 (2005) (J.M. Johnson, J., dissenting) (The GMA is intended to be local-focused, 'bottom up,' rather than a 'top down' planning."); *see also* WAC 365-195-010(3) (The GMA "process should be a 'bottom up" effort . . . with the central locus of decision-making at the local level."). Nor does the GMA provide any provision requiring a minimum of five acre lots in rural areas.

C. The Growth Board Erred in Ruling that Kittitas County's Performance Based Cluster Platting Ordinance (KCC 16.09) violates the requirements of the GMA.

The Growth Board ruled that Kittitas County's Cluster Ordinance (KCC 16.09) violated the GMA because it allowed "urban densities" in the rural areas. *See* AR, p. 1206. ("These densities are urban densities, violate the GMA, and are out of compliance."). The Growth Board reached this conclusion despite the fact that the GMA expressly allows cluster development in rural areas and despite the fact that the ordinance protects rural character and agricultural lands.

1. The Cluster Ordinance is a technique specifically envisioned in the GMA.

The GMA expressly allows cluster development in rural areas. For example, RCW 36.70A.070(5)(b) provides in relevant part:

> The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.

In addition, the GMA allows cluster zoning on lands designated as agricultural lands of long-term commercial significance. RCW 37.70A.177(2)(b) expressly provides that cluster zoning may occur if it "allows new development on one portion of the land, leaving the remainder in agricultural or open space uses." Moreover, the GMA explicitly grants local governments discretion when planning for growth and setting rural densities. *See* RCW 36.70A.3201; *see also* RCW 36.70A.070(5)(b).

The GMA provides in pertinent part:

> (1) A county or a city may use a variety of innovative zoning techniques in areas designated as agricultural lands of long-term commercial significance under RCW 36.70A.170. The innovative zoning techniques should be designed to conserve agricultural lands and encourage the agricultural economy. Except as provided in subsection (3) of this section, a county or city should encourage nonagricultural uses to be limited to lands with poor soils or otherwise not suitable for agricultural purposes.
> (2) Innovative zoning techniques a county or city may consider include, but are not limited to:
> (b) Cluster zoning, which allows new development on one portion of the land, leaving the remainder in agricultural or open space uses.

RCW 36.70A.177.

Despite the plain language of the GMA, the Growth Board once again failed to properly grant deference to Kittitas County when it ruled that the County's Cluster

Ordinance (KCC 16.09) violated the GMA. Although the County's actions must be consistent with the goals and requirements of the GMA, *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wn.2d 543, 553 (2000), the Growth Boards are also required to grant local jurisdictions deference when planning under the Act. *See* RCW 36.70A.3201 ("The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.").

In striking down Kittitas County' Cluster Ordinance (KCC 16.09), the Growth Board failed to grant the proper deference owed to the County. The only analysis the Growth Board provided was that KCC 16.09 was found out of compliance in the Board's previous decision, Case No. 07-1-0004c, and that the densities "are urban densities." AR, p. 1206[8].

Furthermore, the Growth Board's order is not supported by evidence that is substantial when viewed in light of the whole record before the court. BIAW and Kittitas County provided ample evidence of how the Cluster Ordinance (KCC 16.09) complied with the GMA. For example, BIAW argued before the Growth Board that the Cluster Ordinance addressed the GMA's requirement of protecting existing agricultural land by requiring that all applications be evaluated for impacts to adjacent agricultural uses. KCC 16.09.040(E). BIAW further explained that the Cluster Ordinance provides that

---

[8] See also Finding of Fact 3, AR, p. 1251 ("Kittitas County, in adopting KCC 16.09, KCC 17.08, KCC 17.12 (zoning map), 17.22 and 17.56, allows urban-like densities in the rural areas.") and Conclusion of Law 5, AR, p. 1252 ("Kittitas County has allowed urban densities in the rural areas . . .").

"[c]onditions may be placed on development proposals" to "protect agricultural lands from possible impacts related to incompatible uses." *Id.*

2. Kittitas County's Cluster Ordinance satisfies RCW 36.70A and protects existing agricultural land

The only analysis the Growth Board provided was that KCC 16.09 was found out of compliance in the Board's previous decision, Case No. 07-1-0004c, and that the densities are "urban in nature." AR, p. 1206. BIAW and Kittitas County explicitly provided ample evidence of how the Cluster Ordinance (KCC 16.09) complied with the GMA. For example, BIAW argued before the Board that the Cluster Ordinance addressed the GMA's requirement of protecting existing agricultural land by requiring that all applicants be evaluated for impacts to adjacent agricultural uses. KCC 16.09.040(e). BIAW further explained that the Cluster Ordinance provides that "[c]onditions may be placed on development proposals" to protect agricultural lands from possible impacts related to incompatible uses." *Id.*

Despite this evidence presented that KCC complies with the GMA, the Board summarily found the ordinance noncompliant.

Kittitas County's ordinance in fact includes many safeguards to protect rural character and agricultural land. See KCC Ch. 16. First, Kittitas County's Cluster Ordinance addresses the GMA's requirement of protecting existing agricultural land by requiring that all applications for cluster platting were to be evaluated for impacts to adjacent agricultural uses. KCC 16.09.040(E). The Cluster Ordinance further provides that "[c]onditions may be placed on development proposals" to "protect agricultural lands from possible impacts related to incompatible uses." *Id.* Next, the Cluster Ordinance limits how development may occur in the rural areas by setting a minimum acreage. For

example, the minimum amount of open space that is required to be set aside in the Rural-3 and Agricultural-3 zones is nine acres. KCC 16.09.030. In order to be eligible for cluster platting in the Rural-5 and Agricultural zones, the property owner would have to set aside, at a minimum, 15 acres. *Id.* And for areas zoned Agriculture 20 and Forest and Range (one dwelling unit per 20 acres), the minimum open space set aside requirement is 30 acres. *Id.* Last, the Ordinance further restricts the amount of clusters in areas zoned rural and agricultural. For example, the density bonus, allowing more residential lots that the underlying zoning allows, is limited to use in the rural designations with a 100% bonus in the Rural-3, Agricultural-3, Rural-5, and Agricultural-5 areas. KCC 16.09.030. The Ordinance limits density bonuses in the Agricultural-20 and Forest and Range-20 zones to 200%. *Id.*

In addition, the Ordinance seeks to protect the environment in rural areas by conserving water by minimizing the development of exempt wells and by encouraging group water systems. *See* KCC 16.09.010. Moreover, the Ordinance seeks to protect the public health by reducing the number of septic drain fields and reducing sprawl through the clustering of homes. *Id.*

Planned Residential Developments and cluster platting in rural areas were also considered by the court in *Thurston County*. In a footnote, the Court pointed out that both the planned residential development and clustering codes intended to promote "greater flexibility," "open space," and "imaginative design." *Thurston County*, 164 Wn.2d at 356, 190 P.3d 38. The Court concluded that a "county has a great amount of discretion to employ various techniques to achieve a variety of rural densities. *Id.*,

(quoting *Whidbey Envtl. Action Network v. Island County*, 122 Wn.App.156, 167, 93 P.3d 885 (2004).)

In conflict with the decisions in *Thurston County,* 164 Wn.2d at 356, 190 P.3d 38 and *Viking Properties,* 155 Wn.2d 112, 118 P.3d 322, the Board concluded that Kittitas County's Cluster Platting Ordinance allows urban development in rural areas, invalidating the ordinance based on a "bright line" rule that simply does not appear in the GMA.[9] The Board does not have the authority to add language to the GMA. *See, e.g. State v. Delgado*, 148 Wn.2d 723, 727 (2004) (courts and Boards "cannot add words to unambiguous statute when the legislature has chosen not include that language."). No such provision imposing a bright-line rule exists in the GMA. Moreover, the Board failed to give Kittitas County the deference owed to local jurisdictions when planning for growth.

D. The Growth Board Erred by ruling that the County's Planned Unit Development (KCC 17.36) violates the GMA.

The Growth Board concluded that "Kittitas County impermissibly allows urban uses in its rural areas, and fails to include standards to protect the rural character as required by [the GMA]" and that the PUD code allows "urban uses in the rural areas and fail[s] to protect rural character and are not in compliance with the GMA." AR, p. 1212-1213.

In striking down Kittitas County's Planned Unit Development Ordinance (KCC 17.36), the Growth Board failed to grant the proper deference owed to the County according to the requirements of the GMA. In addition, the Growth Board's decision

---

[9] See Conclusion of Law 3, AR, p. 1254 ("Kittitas County allowed improper densities in the rural areas of the County when it adopted KCC 16.09 (Performance Based Cluster Platting) . . .")

regarding the County's Planned Unit Development Zone Ordinance (KCC 17.36) is arbitrary and capricious.

The purpose of the PUD ordinance is as follows:

> The purpose of this chapter is to provide for and encourage a harmonious mixture of land uses with greater flexibility in land use controls than is generally permitted by other sections of this title. This includes:
>
> a. To allow greater flexibility and to encourage more innovative design for the development of residential areas that is generally possible under conventional zoning and subdivision regulations;
> b. To encourage more economical and efficient use of land, streets and public services;
> c. To preserve and create open space and other amenities superior to conventional developments;
> d. To preserve important natural features of the land, including topography, natural vegetation, and views;
> e. To encourage development of a variety of housing types and densities;
> f. To encourage energy conservation, including the use of passive solar energy in project design and development to the extent possible;
> g. To encourage infill development of areas or site characterized by special features of geography, topography, size, shape, or historical legal nonconformity;
> h. To permit flexibility of design that will create desirable public and private open space,; to vary the type, design and layout of buildings,; and to utilize the potentials of individual sites and alternative energy services to the extent possible; (Ord. 2007-22, 2007; Ord. 90-6 (part), 1990: Res. 83-10, 1983)

KCC 17.36.030 provides for a detailed preliminary development plan to be prepared requiring SEPA compliance, detailed plans outlining water supply, storage and distribution, sewage disposal/treatment plans and solid waste collection plan (to name a few). The final development plan requires verification that water and sewer is available to accommodate the development as well as proof that the open spaces are permanent and will be maintained. PUDs are also subject to meeting the criteria for a rezone outlined in KCC 17.98.020. Specifically, the code limits the density of PUDs: "Petitions shall

conform to maximum acreage percentages as identified for the appropriate zones in Kittitas County Code 17.04.060." KCC 17.36.020(5).

Kittitas County's PUD Zone is precisely the type of innovative technique that the GMA allows in order to give local jurisdictions deference and flexibility in achieving density targets. As discussed above, there is no mandatory minimum density required in rural lands. The GMA invites innovative land use planning techniques, including, but not limited to, density bonuses, cluster housing, planned unit developments and transfer of development rights. RCW 36.70A.090.

Implicit in the GMA's invitation to use "innovative techniques" is an assumption that a blanket minimum-acre-per-lot rules are not the only way to retain rural character. Increasingly, Washington courts are recognizing that a local government's discretionary designation of rural areas should consider more than just the minimum number of acres per lot. For example, Washington courts have addressed the countervailing planning problem that occurs when large rural lots are converted from "farm lands into weed patches" as a result of a pattern of low density development in the County. *Woods v. Kittitas County*, 162 Wn.2d 597, 622, 174 P.3d 25 (2007). See also *Henderson v. Kittitas County,* 124 Wn.App. 747, 754, 100 P.3d 842 (2004), *review denied,* 154 Wn.2d 1028, 120 P.3d 73 (2005) a*nd Woods v. Kittitas County*, 130 Wn. App. 573, 123 P.3d 883 (2005), aff'd 162 Wn.2d 597, 174 P.3d 25 (2007). A solution to this problem is designating small rural lots with easements for agriculture, forest or open spaces, which may be "more conducive to retaining rural character" than "large lot zoning." *Henderson*, 124 Wn. App. at 756 (Land Use Petition Act (LUPA) appeal; holding that a re-zone from 20-acre to 3-acre rural lots accomplished goal of retaining rural character).

The cluster and PUD ordinances here are a solution to the problem of large rural lots turning into weed patches. The purpose of the cluster ordinance is to meet the affordable housing needs of Kittitas County citizens, while at the same time protecting the environment by requiring a significant portion of each property to be left as open space. *See* KCC 16.09.010; .030. Likewise, the PUD ordinance seeks to protect "open space" and "natural areas" while at the same time providing flexibility. KCC 17.36

Despite the overwhelming evidence produced by BIAW that KCC 17.36 complies with the GMA, the Growth Board summarily found the ordinance noncompliant and issued a determination of invalidity.[10] In striking down Kittitas County's Planned Unit Development (KCC 17.36), the Growth Board failed to grant the proper deference owed to the County.

The court in *Thurston County* pointed out planned residential developments (as well as clustering, as discussed above) are tools intended to promote flexibility in local land use planning. *Thurston County*, 164 Wn.2d at 356, 190 P.3d 38, footnote 16. The Board's ruling in this case seeks to take away this flexibility. The decision invalidating the PUD ordinance ignores the "great discretion" a county has to achieve a variety of rural densities. *Id.*, (quoting *Whidbey Envtl. Action Network v. Island County*, 122 Wn.App.156, 167, 93 P.3d 885 (2004).)

E. The Growth Board Erred by Ruling that Kittitas County Impermissibly Allows Urban Uses on Agricultural Lands of Long Term Significance

The Growth Board concluded that "Kittitas County impermissibly allows urban uses in its agricultural lands of long-term significance, and fails to include standards

---

[10] See Finding of Fact 4, AR, p. 1251 ("Kittitas County by adopting KCC 17.29 and KCC 17.36 impermissibly allows urban uses in its rural areas. . .")

within its development regulations to limit such uses and protect the commercial agricultural zones." AR, p. 1218. The Board also found that KCC 17.31 (Commercial Agricultural Zone) violates the GMA. *Id.*

The Board failed to identify specific "urban uses" and seems to distort the distinction between agricultural use, natural resource use and urban use by concluding that certain uses (e.g. mining) is incompatible with other agricultural or natural resource uses.

The Code clearly provides that the conditional uses possible in the Commercial Agricultural Zone (listed in KCC 17.31.030) "shall be subordinate to primary agricultural uses of this zone." It also provides lot size limitations in 17.31.040 and special setback requirements in 17.31.110. These amount to the "standards" that the Board erroneously said the County "fail[ed] to include." AR, p. 1218.

F. The Growth Board Erred by ruling on KCC 16.04 Violates the GMA Because the Ordinance Allows Multiple Exempt Wells .

The Growth Board found KCC 16.04 – Kittitas County's subdivision code – noncompliant and issued a determination of invalidity because the ordinance allows multiple subdivisions in common ownership to withdraw ground water through the use of exempt wells. According to the Growth Board, allowing multiple exempt wells in this manner violates the Washington Supreme Court's decision, *Campbell & Gwinn*, 146 Wn.2d 1. AR, p. 1223. The Growth Board further ruled that it had jurisdiction to decide the issue under the GMA, and that KCC 16.09 violated RCW 36.70A.020(10) and RCW 36.70A.070(5)(c)(iv). *See* AR, p. 1221-1223.

The Growth Board erred in reaching this decision. The Growth Board does not have subject matter jurisdiction to determiner whether KCC 16.04 violates RCW 90.44 or

whether the ordinance is precluded under the Washington Supreme Court's decision in *Campbell & Gwinn*. In *Campbell & Gwinn*, the Department of Ecology (Ecology) sued a developer and property owner over its proposed development of 16 lots. Specifically, Ecology sought declaratory and injunctive relief asking the superior court to declare that the developer, under RCW 90.44.050, could not cumulatively withdraw in excess of 5,000 gallons per day from multiple wells individually serving each lot, without first obtaining a permit or other formal authorization. *Campbell & Gwinn*, 146 Wn.2d at 8.

Under the GMA, Growth Management Hearings Boards do not have authority to determine these types of issues. The GMA expressly provides, in pertinent part, that the Boards only have subject matter jurisdiction over petitions alleging either:

> (a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; or
> (b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted.
> RCW 36.70A.280.

This Board does not have authority to determine whether KCC violates RCW 90.44.050 under a *Campbell & Gwinn* analysis. Withdrawal of ground water is regulated by the Department of Ecology under RCW 90.44.050. *See Campbell & Gwinn*, 146 Wn.2d at 7-8. The Growth Boards do not have statutory authority under the GMA to decide issues regarding exempt wells.

The Growth Board's decision finding KCC 16.04 noncompliant with the GMA and its determination of invalidity is outside the statutory authority or jurisdiction of the

Growth Board, is an erroneous application of the law, and is arbitrary and capricious. RCW 34.05.570(3)(b)(d), & (i).

G. The Growth Board Erred By Invalidating Kittitas County's One-Time Split Option.

The Growth Board concluded that the County's "development regulations concerning one-time splits are inadequate to protect agricultural lands. . ." and ruled that because of this, KCC 17.29 and 17.31 violate the GMA. AR, p. 1235. Despite the Board's ruling, the county's "one-time split" option is a tool that results in a variety of lot sizes consistent with rural character. In addition, there is nothing in the GMA that rejects this concept.

KCC 17.29.040 provides:

> Twenty acres for any lot or parcel created after the adoption of the ordinance codified in this chapter, except that one smaller lot may be divided off any legal lot; provided such parent lot is at least eight acres in size; and provided, that such divisions are in compliance with all other county regulations (e.g., on-site septic system). Parcels must be located within the Agriculture-20 zone at the date of the adoption of this code. Once this provision has been applied to create a new parcel, it shall not be allowed for future parcel subdivision, while designated commercial agricultural zone. Onetime splits shall be completed via the short plat process. The onetime parcel split provision should be encouraged where it is adjacent to ongoing commercial agricultural practices, especially since the intent of this provision is to encourage the development of homesite acreage rather than removing commercial agricultural lands out of production.

By concluding that the County's development regulations are "inadequate to prevent prime agricultural land from being lost to small, one-time lot divisions," (AR, p. 1235), the Board assumes that density will change along with "variable lot sizes." This ignores the "parent lot" requirements in KCC 29.040 outlined above and also ignores the GMA, which opens the door to the option of a small parcel split as a zoning technique to be used to achieve a lesser impact on farm land:

(3) Innovative zoning techniques a county or city may consider include, but are not limited to:

(a) Agricultural zoning, which limits the density of development and restricts or prohibits nonfarm uses of agricultural land and may allow accessory uses, including nonagricultural accessory uses and activities, that support, promote, or sustain agricultural operations and production, as provided in subsection (3) of this section;

(b) Cluster zoning, which allows new development on one portion of the land, leaving the remainder in agricultural or open space uses;

(c) Large lot zoning, which establishes as a minimum lot size the amount of land necessary to achieve a successful farming practice;

(d) Quarter/quarter zoning, which permits one residential dwelling on a one-acre minimum lot for each one-sixteenth of a section of land; and

(e) Sliding scale zoning, which allows the number of lots for single-family residential purposes with a minimum lot size of one acre to increase inversely as the size of the total acreage increases.

RCW 36.70A.177

The GMA does not rule out the one time split option nor does it impose a rule for how large or small the parcels must be. This "innovative technique" is simply a tool to preserve farmland and to preserve working farms by allowing acreage for home sites without increasing average density. Once more, the Growth Board has failed to grant Kittitas County proper deference under the GMA.

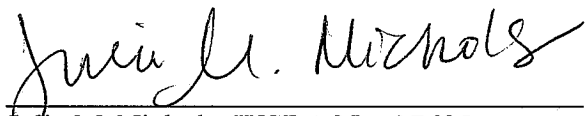
V. Conclusion

Under the GMA, a Growth Board may issue a determination of invalidity if: 1) the Growth Board determines that parts of – or all of – a county's comprehensive plan or development regulations are noncompliant; 2) that continued validity of the development regulations would substantially interfere with the fulfillment of the GMA goals; and 3) the Growth Board specifies in the final order the particular parts of the comprehensive

plan or development regulations that are determined to be invalid. RCW 36.70A.302(1)(a)-(c).

As outlined in sections IV(A) through (G) of this brief, *supra*, the Growth Board's Final Order and Decision is outside of the Board's statutory authority or jurisdiction, is an erroneous application and interpretation of the law, is not supported by the evidence that is substantial when viewed in light of the whole record before the court, and is arbitrary and capricious. *See* RCW 34.05.570(3)(b), (d), (e), & (i). As a result, this Court should reverse the Growth Board's determination of invalidity under RCW 36.70A.302.

Respectfully submitted this 23rd day of April, 2009.



Julie M. Nichols, WSBA No. 37685
Timothy M. Harris, WSBA No. 29906
Attorneys for Appellant Building Industry Association of Washington
111-21st Ave SW
Olympia, WA 98507
(360) 352-7800
(360) 352-7801 fax
julien@biaw.com